



## **Federal Highway Administration**

### **23 CFR Parts 630 and 635**

**[FHWA Docket No. FHWA-2018-0017]**

**RIN 2125–AF83**

### **Indefinite Delivery and Indefinite Quantity Contracts for Federal-Aid Construction**

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

**ACTION:** Final Rule.

**SUMMARY:** On November 16, 2020, FHWA published an interim final rule (IFR) amending FHWA’s regulations to allow States the ability to use the Indefinite Delivery and Indefinite Quantity (ID/IQ) method of contracting, including job order contracting (JOC), on Federal-aid highway projects, under certain circumstances, on a permanent basis. This action adopts the IFR with a few minor changes and technical amendments. Most provisions from the IFR remain unchanged. This action also restores a missing provision inadvertently removed during an earlier, unrelated rulemaking.

**DATES:** This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Mr. James DeSanto, Office of Preconstruction, Construction, and Pavements, [james.desanto@dot.gov](mailto:james.desanto@dot.gov), (614) 357-8515, or Mr. Patrick Smith, Office of the Chief Counsel, [patrick.c.smith@dot.gov](mailto:patrick.c.smith@dot.gov), (202) 366-1345, Federal Highway Administration, 1200 New Jersey Avenue, S.E., Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., EST, Monday through Friday, except Federal holidays.

## **SUPPLEMENTARY INFORMATION:**

### **Electronic Access and Filing**

This document, as well as the IFR, advance notice of proposed rulemaking, supporting materials, and all comments received may be viewed online through the Federal eRulemaking portal at: [www.regulations.gov](http://www.regulations.gov). An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: [www.FederalRegister.gov](http://www.FederalRegister.gov) and the Government Publishing Office's Web page at: [www.GovInfo.gov](http://www.GovInfo.gov).

### **Background**

The ID/IQ method of contracting allows a project owner to procure an unknown quantity of supplies or services for a fixed time. As described in FHWA's IFR, 85 FR 72919 (Nov. 16, 2020), government agencies use this method when they cannot determine, above a specified minimum, the precise quantities of supplies or services that they will require during the contract period. Contracting agencies use other names for these and similar types of contracts, including JOC contracts, master contracts, on-call contracts, area-wide contracts, continuing contracts, design-build push-button contracts, push-button contracts, stand-by contracts, and task order contracts.

With the publication of FHWA's IFR, FHWA operationalized the ID/IQ method of contracting, including JOC, for Federal-aid construction projects. Previously, this contracting technique was only authorized on an experimental basis under FHWA's Special Experimental Project No. 14 (SEP-14). Allowing ID/IQ contracting on a permanent basis provides benefits to State departments of transportation (State DOT) and other contracting agencies, including expediting project delivery, increasing administrative efficiency, reducing project costs, and increasing flexibility for State DOTs to use Federal-aid funds on certain projects. Additional discussion on State DOT and local public agency experience with ID/IQ contracting under FHWA's SEP-14

program, as well as FHWA's previous steps to operationalize ID/IQ contracting, is provided in the IFR.

### **Interim Final Rule**

On November 16, 2020, FHWA published its IFR in the Federal Register at 85 FR 72919, adopting new regulations and soliciting public comments on its proposal. Comments were submitted by six State DOTs, one metropolitan planning organization, one business, and one individual. The comments are available for examination in the docket (FHWA-2018-0017) at [www.regulations.gov](http://www.regulations.gov).

### **Analysis of Interim Final Rule Comments and FHWA Response**

The following discussion summarizes the comments submitted to the docket on the IFR, notes where and why FHWA has made changes in the final rule, and explains why certain recommendations or suggestions have not been incorporated into the final rule.

In general, most commenters supported the rule. Comments generally related to requests for clarification or interpretation of various provisions in the regulatory text. Some commenters responded to questions about specific issues posed by FHWA in the IFR. FHWA has carefully reviewed and analyzed all comments and revises the final rule as discussed below.

#### **General**

The San Diego Association of Governments (SANDAG) expressed support for the IFR. SANDAG cited its previous experience with ID/IQ contracting under the SEP-14 program and stated the method achieved quicker project delivery; reduced design, procurement, and construction costs; and provided a more efficient and flexible contracting method to address changing field conditions. FHWA appreciates these comments and finds no substantive response is needed.

The Delaware Department of Transportation (Delaware DOT) expressed overall support for the IFR. It explained that it generally favors less Federal requirements with more deference to State and local agencies. The Delaware DOT explained that its use of multiple-award ID/IQ contracts enables it to deliver relatively small projects very quickly, thereby benefitting the public significantly earlier than traditional procurement methods. Delaware DOT also cited reduced staff costs and efforts related to administration of ID/IQ projects, which also enables project costs to be reasonably managed. FHWA appreciates these comments and finds no substantive response is needed.

Gordian, a company in Greenville, South Carolina, expressed its support for fully operationalizing ID/IQ contracting, including JOC. In addition, Gordian shared its views on industry best practices and was responsive to FHWA's questions in the IFR, as discussed in later sections of this notice.

### **Cost and Time Savings**

In the IFR, FHWA asked a series of questions about cost and time savings based on the use of the ID/IQ contracting method. FHWA received a few responsive comments which generally noted that cost savings would be realized, and that ID/IQ contracting may reduce procurement cycle time. FHWA received little additional data that was not considered in its original analysis. Some of the State DOT commenters explained that they did not yet have enough experience and data with this contracting to provide answers.

Among the few responsive comments, Gordian provided examples of Federal-aid projects saving between 5 and 20 percent relative to other contracting methods. Gordian also maintained that using ID/IQ may reduce procurement cycle time for straightforward construction projects by as much as 90 percent.

In addition, the Pennsylvania Department of Transportation (PennDOT) explained that it does not have experience with ID/IQ contracting to date but anticipates ID/IQ would reduce project or construction costs over the life of the contract. It also expects that over time the prices associated with ID/IQ contracts may be slightly lower than traditional contracts due to the anticipation of consistent work for contractors and the ease of assigning unanticipated or emergency work.

FHWA agrees with the responsive comments that ID/IQ contracting is likely to reduce project costs and expedite project delivery of certain highway projects. FHWA did not receive sufficient new data to warrant revising its analysis of cost savings from operationalizing ID/IQ contracting on a permanent basis provided under the IFR.

### **Section-by-Section Analysis**

#### **Part 635 – Construction and Maintenance**

##### **Subpart A – Contract Procedures**

##### **Section 635.110 – Licensing and qualification of contractors**

The Idaho Transportation Department inquired about licensing and bonding of ID/IQ projects, specifically whether licensing and bonding requirements should consider the value of the “master agreement” (ID/IQ contract) or the value of the work order.

In general, FHWA’s contracting regulations do not specify the process or provide requirements for furnishing performance bonds on Federal-aid projects. In general, contracting agencies may use their own procedures and requirements for bonding, insurance, prequalification, qualification, or licensing of contractors on Federal-aid projects as long as those procedures do not restrict competition (23 CFR 635.110(b)). For example, an agency may choose to adjust its requirements to facilitate more small business participation. The revision in 23 CFR 635.110(f) in the IFR simply clarifies that the general requirement also applies to ID/IQ contracting. FHWA has considered the comment and believes no further revision to this section is necessary.

## **Section 635.112 – Advertising for bids and proposals**

The Michigan Department of Transportation recommended that the requirement for FHWA Division Administrator prior approval of addenda be delegated to State DOTs. FHWA believes this approval as set forth in the IFR is consistent with similar requirements for other contracting methods and is subject to the statutory assumption provisions under 23 U.S.C. 106(c). FHWA has considered this comment and believes FHWA divisions and State DOTs may incorporate project-specific approval actions related to ID/IQ contracting into their agreements under 23 U.S.C. 106(c)(3), thus, no further revision to the rule is required.

## **Section 635.114 – Award of contract and concurrence in award**

In the IFR, FHWA added § 635.114(m) requiring ID/IQ contracts be awarded in accordance with the solicitation document. FHWA revised this section in a manner consistent with other contracting methods, recognizing that contracting agencies desire flexibility when configuring their ID/IQ solicitations and contracts. While FHWA did not receive public comments specifically addressing the amendment to the regulation in the IFR at § 635.114(m), and FHWA is not making any changes to that section, FHWA recommends that contracting agencies ensure their ID/IQ solicitation documents contain adequate provisions, where appropriate, to address analyzing bids for unbalancing or extreme variations within bids as compared to the engineer's estimate.

## **Subpart C – Physical Construction Authorization**

### **Section 635.309 – Authorization**

In FHWA's construction manager/general contractor (CM/GC) final rule, published in the Federal Register on December 2, 2016, at 81 FR 86928, FHWA clarified the provision at § 635.309(p)(1)(vi) established requirements for design-build Request for Proposals and CM/GC initial solicitation documents. Through an administrative error, two sections, §§ 635.309(p)(1)(vi)(A) and (B) were removed from the regulation.

FHWA has restored the language that predates the CM/GC final rule to correct its inadvertent removal and restore the logical meaning and remainder of the provision.

While these changes were not included in the previous IFR for this rulemaking, FHWA has determined that prior notice and opportunity for comment are unnecessary under 5 U.S.C. 553(b)(3)(B) because these provisions constitute a technical correction to fix a clear error in the CFR language to restore the missing content previously established through rulemaking. Furthermore, prior notice and an opportunity for public comment on these provisions is contrary to the public interest because it republishes substantive provisions which were removed in error. For these reasons, FHWA finds good cause to forgo further procedures for notice and opportunity for comment under 5 U.S.C. 553(b)(3)(B).

## **Subpart F – Indefinite Delivery/Indefinite Quantity (ID/IQ) Contracting**

### **Section 635.602 – Definitions**

The Oregon Department of Transportation (Oregon DOT) raised questions seeking clarification on contractual terms used in the IFR. The Oregon DOT asked if FHWA intended the term “contract” as used throughout the rule, and specifically in § 635.604(a)(6), to mean the ID/IQ contract, or the work order. The Oregon DOT argued that an ID/IQ contract is a “master contract” or an “agreement-to-agree” and that the work order is an actual contract, thereby clouding the understanding of optional contract extensions in §§ 635.604(a)(6)(i) through (iii).

The IFR provides a definition of the term ID/IQ contract, which includes defining it as “the principal contract between the contracting agency and the contractor.” In addition, the definition of ID/IQ contract also contains common names used by agencies around the Nation, one of which is “master contract.” Also, the IFR provides a definition of work order, stating it “means the contract document issued for a definite scope of work under an ID/IQ contract.”

Throughout the rule, FHWA has attempted to consistently use the terms above to clearly convey our meaning. FHWA appreciates the points raised and has carefully considered the comments. While FHWA disagrees that the definitions of ID/IQ contract and work order are insufficient, we acknowledge that the use of the undefined term related to optional contract extensions has the potential to cause confusion. As discussed below, FHWA has modified §§ 635.604(a)(6)(i) and 635.604(a)(6)(ii) to consistently refer to optional contract extensions.

## **Section 635.604 – ID/IQ requirements**

### **635.604(a)(3)(ii)**

The IFR includes a provision in § 635.604(a)(3)(ii) addressing methods to adjust prices when optional contract extensions are included in an ID/IQ contract and solicitation. While FHWA did not receive public comments to the docket on this topic, we believe additional clarification on this point in the preamble may assist contracting agencies when developing ID/IQ projects.

For clarification, as implied by the plain language, FHWA does not intend the phrase in § 635.604(a)(3)(ii), “specify the basis, such as a published index” to exclude alternatives other than a published index. FHWA views other methods, such as predetermining and publishing a fixed percentage in the solicitation, or requesting bidders supply an adjustment percentage with their bid, as transparent and objective means of adjusting prices for optional contract extensions, which may reasonably be used under this rule. FHWA is not making any revisions to the proposed regulatory text as a result of this clarification.

### **635.604(a)(3)(iii)**

In FHWA’s IFR, we asked commenters to address specific questions relating to the rule. Two of the questions related to this section of the regulation: one question asked about FHWA requiring estimated minimum and maximum quantities to be



provided in both ID/IQ solicitations and contracts or requiring estimates for any other reason; another asked if FHWA should require agencies to specify the estimated minimum and maximum quantities that may be expected under each work order.

The Delaware DOT responded by opposing the requirement to specify estimated minimum and maximum quantities of services for ID/IQ contracts. They cited their success in bidding ID/IQ projects using an expected or approximate amount of work, while clearly noting in the contract document that issuing work orders is not guaranteed.

Gordian recommended against the requirement to specify estimated minimum and maximums, thereby providing flexibility to contracting agencies. Gordian explained that in its experience some agencies may elect to include this information, but in its opinion it is not necessary for successful implementation. Gordian suggested a more appropriate approach would be to require an estimated annual dollar value of work, on which contractors could base their initial bid.

The PennDOT commented that it does not recommend requiring estimated minimum and maximum quantities in ID/IQ solicitations and contracts but does recommend including a requirement for estimating minimum and maximum quantities expected in a work order.

The Vermont Agency of Transportation (VTrans) advised against requiring estimated minimum and maximum quantities in ID/IQ solicitations and contracts, citing the difficulty to program all Federal and State projects that may utilize ID/IQ contracting over a period of 5 years. The VTrans described such an exercise as speculative and unreliable. They further stated their process of using both line items and lump sum bidding on work orders has been efficient and thus recommended against requiring an estimate of minimum and maximum quantities expected for a work order.

FHWA appreciates the responses and has carefully considered the comments. FHWA agrees it is not necessary to mandate that contracting agencies specify the

minimum and maximum quantity of services to be acquired under an ID/IQ contract. However, a reasonable estimate of quantities in the solicitation is necessary to serve as a basis for bidders to base their prices as well as serving as a basis for analyzing bids. For this reason, FHWA has modified this section accordingly to require a reasonable estimate of quantities in the solicitation. We also agree with the importance of clearly stating in the solicitation, when appropriate, that the estimate of quantities does not guarantee work orders will be issued. However, even if a minimum award provision is included in the solicitation or contract, § 635.604(a)(7), which remains unmodified under the final rule, provides that a contracting agency's payment to a contractor to satisfy a minimum award provision that is not supported by eligible work is not eligible for Federal-aid participation.

#### **635.604(a)(5)**

The IFR included two questions specific to the topic of multiple award ID/IQ contracts. One question solicited input on criteria to be used when issuing work orders under multiple-award contracts, while another question asked commenters to consider if typical cause and convenience termination clauses are sufficient to remove deficient contractors from consideration in a multiple award pool.

Several commenters cited contractor availability as a reasonable criterion to use when issuing work orders in a multiple award ID/IQ contract. The Delaware DOT recommended a process where the low-cost contractor is first offered a work order, and if it declines or is unavailable to start, the contracting agency will then offer the work order opportunity to the next low-cost contractor. The Delaware DOT also commented that if the low-cost contractor is in liquidated damages on the project or other active projects, that contractor would not be eligible to be issued additional work orders. In response, FHWA believes fair and competitive procedures, set forth in the solicitation and ID/IQ contract as required in § 635.604(a)(3)(v), may account for contractor availability or

liquidated damages status. However, awardees of multiple award ID/IQ contracts must have a fair opportunity to be considered for each work order, as stated in this section. Therefore, no revisions are made to the regulatory text to address this comment.

The Delaware DOT also suggested a scenario where a contracting agency could bypass the low-cost contractor “if the second-lowest-cost contractor is within a close percentage of the low-cost contractor” and the agency believes doing so would be in the agency’s and public’s interest. In addition, Gordian recommended allowing work orders issued on multiple award ID/IQ contracts using the JOC method be issued on a rotating basis “so that the dollar value of assigned work is approximately equal.” The Oregon DOT asked if FHWA would accept a result where “the same few master contract holders being awarded all of the work orders, with some firms receiving few to no work orders over the life of the contract.” The PennDOT and Oregon DOT recommended competitive methods be used to issue work orders.

In response to these comments, FHWA believes non-competitive methods of issuing work orders on multiple award ID/IQ contracts (including JOC contracts), such as on a rotating basis, or using other factors not related to competition or contractor disqualification, are contrary to the statutory competitive bidding requirement set forth in 23 U.S.C. 112. FHWA acknowledges that low bidders may be successful in being offered and awarded most, if not all, work orders in a multiple award ID/IQ contract based upon analyses of bid prices and actual work order quantities. Consistent with statutory requirements, FHWA is maintaining the regulatory prohibition against rotating or other non-competitive issuance of work orders.

The Delaware DOT commented that typical cause and convenience termination clauses are sufficient to remove contractors from the pool of those to be considered when issuing work orders when those contractors are not meeting the terms of the contract. The Delaware DOT recommended this issue be deferred to State or local procedures.

Gordian also supported providing flexibility to contracting agencies to use their own procedures and be able to suspend assigning work to a particular contractor for cause.

The VTrans cited their process of providing contractors with post-construction evaluations and written warning of any significant issue that may lead to “off-ramping” a contractor, providing that contractor an opportunity to address deficiencies. FHWA acknowledges these comments and does not believe the regulatory text requires further revision.

#### **635.604(a)(6)**

The Oregon DOT made several comments requesting clarification on FHWA’s contractual terms, including as they are used in § 635.604(a)(6)(ii) related to wage determinations in ID/IQ contracts. The Oregon DOT commented that while the IFR provides requirements for updating prevailing wage rates when optional contract extensions are executed, FHWA did not address requirements for prevailing wages applicable to the original term of an ID/IQ contract or “master contract.” FHWA has considered this comment and believes the issue is sufficiently addressed in the existing regulation at 23 CFR 635.117(f). Under that regulation, the appropriate wage rates are to be identified in the bidding documents, which must specify “that such rates are a part of the contract covering the project.” FHWA believes this applies to ID/IQ contracts just as it would be to other competitive procurements, subject to the requirements of 29 CFR 1.6, where a correct wage determination remains in effect for the term of a contract. In this context, the contract is the ID/IQ contract, not the individual work orders falling under the ID/IQ contract. FHWA does not believe the regulatory text requires further revision.

The Oregon DOT asked if wage rates “in effect on the date of the execution of a two-year contract extension of the master contract would apply to all work orders issued at any time during the two-year extension.” In the IFR, FHWA intended

§ 635.604(a)(6)(ii) to address this issue and agrees the prevailing wage determination cited in Oregon DOT's example would be in effect for all work orders issued during the term of the extension, unless and until a new optional contract extension is executed. As discussed above and further discussed in the Definitions section at 635.602, FHWA is further revising §§ 635.604(a)(6)(i) and 635.604(a)(6)(ii) to consistently refer to optional contract extensions.

#### **Section 635.605 – Approvals and authorizations**

In the IFR, FHWA requested comments about procedures that could be implemented to efficiently review and approve small preventative maintenance projects with limited scope in numerous locations. Several commenters shared best practices and suggestions. FHWA appreciates these responses, which are best suited for incorporation into future ID/IQ contracting guidance, summaries of peer exchanges, or technical assistance provided by FHWA. FHWA is not making changes to the regulation based on these comments.

#### **Section 635.606 – ID/IQ procedures**

The Delaware DOT commented about the number of FHWA approvals included in the IFR. In its opinion the number seems more than necessary. The Delaware DOT proposed FHWA Division Administrators approve a set of ID/IQ procedures, after which project-specific approvals would not be required. In response, FHWA believes the approvals set forth in the IFR are consistent with similar requirements in other contracting methods, and most are subject to the statutory assumption provisions under 23 U.S.C. 106(c). Notable exceptions to these assumption provisions include the approval of proposed ID/IQ procurement procedures under § 635.605(a) and the execution of formal project agreements under § 630.106. FHWA has considered the comment and believes FHWA division offices and State DOTs may incorporate project-specific approval actions related to ID/IQ contracting into their agreements under 23

U.S.C. 106(c)(3), similar to the approach with other contracting methods, and that no further revision to the rule is required.

In the IFR, FHWA asked the public to consider procedures that should be in place when using ID/IQ procedures within a design-build contract to ensure compliance with this subpart as well as 23 CFR part 636 and related requirements. FHWA received few responses to this question, with commenters indicating they did not have experience with combining the design-build method with ID/IQ contracting. Gordian recommended FHWA not mandate specific procedures. FHWA appreciates the responses and finds no further revision to the rule is required.

### **Regulatory Analyses and Notices**

#### **Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures**

FHWA has considered the impacts of this rule under E.O. 12866 (58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review, as supplemented by E.O. 13563 (76 FR 3821, Jan. 21, 2011), Improving Regulation and Regulatory Review, and DOT's regulatory policies and procedures. The Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) has determined that this rulemaking is not a significant regulatory action under section 3(f) of E.O. 12866. Accordingly, OMB has not reviewed it under that E.O.

As described above, this rule adopts the IFR published by FHWA on November 16, 2020, with a few minor changes and technical amendments. Most provisions from the IFR remain unchanged. The IFR amended FHWA's regulations to allow States the ability to use the ID/IQ method of contracting, including JOC, on Federal-aid highway projects, under certain circumstances, on a permanent basis. This action also restores a minor provision in 23 CFR part 635 inadvertently removed during an earlier, unrelated

rulemaking. As with the IFR, FHWA believes that the rule will provide cost savings for, and expedite project delivery of, certain highway projects.

FHWA did not receive many comments in response to questions about cost and time savings based on the use of the ID/IQ contracting method. Commenters generally believed that cost savings would be realized, and that procurement time would be reduced for certain projects but, provided little additional data that was not considered in FHWA's original analysis under the IFR. FHWA agrees with the responsive comments that ID/IQ contracting is likely to reduce project costs and expedite project delivery but did not receive sufficient new data to warrant revising its earlier analysis under the interim final rule where it anticipated a cost savings, measured in 2019 dollars, of \$3.4 million per year at a 7 percent discount rate.

### **Congressional Review Act**

Pursuant to the Congressional Review Act (5 U.S.C. 801, et seq. ), the Office of Information and Regulatory Affairs designated this rule as not a "major rule," as defined by 5 U.S.C. 804(2).

### **Regulatory Flexibility Act (Small Entities)**

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), FHWA has evaluated the effects of this action on small entities and has determined that the action is not anticipated to have a significant economic impact on a substantial number of small entities. The amendment addresses obligation of Federal funds to States for Federal-aid highway projects. As such, it affects only States and States are not included in the definition of small entity set forth in 5 U.S.C. 601. Therefore, FHWA certifies that the action will not have a significant economic impact on a substantial number of small entities.

## **Unfunded Mandates Reform Act of 1995**

This rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48, March 22, 1995) as it will not result in the expenditure by State, local, Tribal governments, in the aggregate, or by the private sector, of \$155 million or more in any 1 year (2 U.S.C. 1532 et seq.). In addition, the definition of “Federal mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility.

## **Executive Order 13132 (Federalism)**

This action has been analyzed in accordance with the principles and criteria contained in E.O. 13132 dated August 4, 1999, and FHWA has determined that this action would not have a substantial direct effect or sufficient federalism implications on the States. FHWA has also determined that this action would not preempt any State law or regulation or affect the States’ ability to discharge traditional State governmental functions.

## **Executive Order 12372 (Intergovernmental Review)**

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program. Local entities should refer to the Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction, for further information.

## **Paperwork Reduction Act (Collection of Information)**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et. seq.), Federal agencies must obtain approval from OMB for each collection of information they



conduct, sponsor, or require through regulations. FHWA has determined that the rule does not contain collection of information requirements for the purposes of the PRA.

### **National Environmental Policy Act**

FHWA has analyzed this action for the purpose of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), and has determined that this action would not have any effect on the quality of the environment and meets the criteria for the categorical exclusion at 23 CFR 771.117(c)(20).

### **Executive Order 13175 (Tribal Consultation)**

FHWA has analyzed this action under E.O. 13175, dated November 6, 2000, and believes that the action would not impose substantial direct compliance costs on Indian Tribal governments; and would not preempt Tribal laws. The rulemaking addresses obligations of Federal funds to States for Federal-aid highway projects and would not impose any direct compliance requirements on Indian Tribal governments. To the extent that Tribes utilize these regulations, they would be expected to derive the same benefits identified above. Therefore, a Tribal summary impact statement is not required.

### **Executive Order 12898 (Environmental Justice)**

E.O. 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. FHWA has determined that this final rule does not raise any environmental justice issues.

### **Regulation Identification Number**

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN

number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

**List of Subjects in 23 CFR part 630**

Government contracts, grant programs-transportation, highway safety, highways and roads, reporting and recordkeeping requirements, traffic regulations.

**List of Subjects in 23 CFR part 635**

Grant programs-transportation, highways and roads, reporting and recordkeeping requirements.

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Stephanie Pollack  
Deputy Administrator  
Federal Highway Administration

For the reasons set out above, the interim final rule amending title 23 Code of Federal Regulations, parts 630 and 635, which was published at 85 FR 72919 on November 16, 2020, is adopted as final with the following changes:

**PART 635 – CONSTRUCTION AND MAINTENANCE**

**Subpart C—Physical Construction Authorization**

1. The authority for part 635 continues to read as follows:

Authority: Sections 1525 and 1303 of Pub. L. 112–141, Sec. 1503 of Pub. L. 109–59, 119 Stat. 1144; 23 U.S.C. 101 (note), 109, 112, 113, 114, 116, 119, 128, and 315; 31 U.S.C. 6505; 42 U.S.C. 3334, 4601 et seq.; Sec. 1041(a), Pub. L. 102–240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.85(a)(1).

2. Amend § 635.309 by adding paragraphs (p)(1)(vi)(A) and (B) to read as follows:

**§ 635.309 Authorization.**

\* \* \* \* \*

(p) \* \* \*

(1) \* \* \*

(vi) \* \* \*

(A) A statement concerning scope and current status of the required services; and

(B) A statement which requires compliance with the Uniform Relocation and Real Property Acquisition Policies Act of 1970, as amended, and 23 CFR part 710.

\* \* \* \* \*

#### **Subpart F—Indefinite Delivery/Indefinite Quantity (ID/IQ) Contracting**

3. Amend § 635.604 by revising paragraphs (a)(3)(iii), (a)(6)(i) and (ii) to read as follows:

##### **§ 635.604 ID/IQ requirements.**

(a) \* \* \*

(3) \* \* \*

(iii) Specify the estimated quantity or value of services the contracting agency anticipates it may acquire under the contract, either on an annual basis or over the entire initial term of the ID/IQ contract.

\* \* \* \* \*

(6) \* \* \*

(i) Prior to granting an optional contract extension of the ID/IQ contract, the contracting agency must receive concurrence from the Division Administrator.

(ii) For ID/IQ contracts where prevailing wages apply under 23 U.S.C. 113, the current prevailing wage rate determination as determined by the U.S. Department of Labor in effect on the date of the execution of the optional contract extension of the ID/IQ contract shall apply to work covered under the optional contract extension.

\* \* \* \* \*